STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY SANCHEZ,

Defendant-Appellant.

UNPUBLISHED
September 29, 2009

No. 284987
Muskegon Circuit Court
LC No. 07-055417-FH

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of attempted resisting and obstructing a police officer (attempt to disarm a police officer of a firearm), MCL 750.479b(2); attempted resisting and obstructing a police officer (attempt to disarm a police officer of a non-firearm), MCL 750.479b(1); three counts of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1); operating a motor vehicle with a suspended or revoked license, second offense, MCL 257.904(1) and (3)(b); failure to stop at the scene of a personal injury accident, MCL 257.617a; and operating a motor vehicle while intoxicated, MCL 257.625(1). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to prison terms of 44 months to 10 years for the attempted resisting and obstructing a police officer (attempt to disarm a police officer of a firearm) conviction, 1 to 4 years for the attempted resisting and obstructing a police officer (attempting to disarm a police officer of a non-firearm baton) conviction, 1 to 4 years for each of his assault, resisting, or obstructing a police officer convictions, and jails terms of 71 days each for his convictions of operating a motor vehicle with a suspended or revoked license, failure to stop at the scene of a personal injury accident, and operating a motor vehicle while intoxicated. Defendant appeals as of right. We affirm.

Defendant first argues that he did not voluntarily, knowingly, and intelligently waive his right to be represented by counsel at trial. This Court reviews a trial court's findings regarding whether a defendant's waiver of counsel was voluntary, knowing, and intelligent for clear error, while the determination of the meaning of knowing and intelligent waiver is a question of law that is reviewed de novo. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). This Court reviews a trial court's decision to allow a defendant to represent himself for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

The Sixth Amendment of the United States Constitution guarantees the right to counsel at all stages of the criminal process to defendants who may be subject to incarceration. US Const,

Am VI. The Sixth Amendment right to counsel has been incorporated into the substantive due process clause of the Fourteenth Amendment, and has thus been made applicable to the states. US Const, Am XIV; *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). The United States and Michigan Constitutions also protect a defendant's right of self-representation at trial; however, the exercise of this right is subject to the discretion of the trial court. *People v Willing,* 267 Mich App 208, 219; 704 NW2d 472 (2005).

Before allowing a defendant to represent himself or herself, the trial court must consider the defendant's request to do so in light of the following factors: "(1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *Willing, supra* at 219, citing *People v Anderson,* 398 Mich 361, 367-368; 247 NW2d 857 (1976). See also, *Faretta v California,* 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562, (1975). Further, the trial court is required to comply with MCR 6.005(D), which allows a trial court to accept a defendant's initial waiver of the right to counsel only after:

> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Before a defendant can effectively waive the right to counsel, a trial court must substantially comply with the factors set forth in *Anderson, supra,* and the requirements of MCR 6.005(D). *Willing, supra* at 220. That a defendant did not waive his or her right to counsel is presumed. *Id.* Rather, "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Id.,* quoting *Williams, supra* at 641.

Here, the trial court did not clearly err in finding that defendant's request to represent himself and waive his right to counsel was unequivocal, knowing, intelligent, and voluntary. Although defendant also discussed the option of hiring another attorney, he indicated that he was not satisfied with his appointed counsel, wanted him discharged, and felt he would be better off representing himself. He also indicated that he understood, after the trial court's repeated warnings, that he would not be appointed another attorney or stand-by counsel, so his options were to represent himself or try to hire another attorney in the few weeks before the rescheduled trial. The trial court warned defendant that it might be difficult to find another attorney. Defendant also indicated that he was "going to enjoy" representing himself on the first day of trial. Essentially, defendant asserts that because of the dangers of self-representation and his lack of education about criminal and procedural law, his waiver could not have been knowing, intelligent, and voluntary. However, there is no requirement that the trial court educate defendant about the rules of evidence, trial procedure, or substantive law, in order to allow him to exercise his right to represent himself. The trial court is only required to inform the defendant of the risks of self-representation, which include the fact that the defendant does not possess that knowledge and would be at a disadvantage. *People v Russell,* 471 Mich 182, 193 n 27; 684 NW2d 745 (2004). The trial court adequately warned defendant of the pitfalls of self-

representation. The trial court also advised defendant of the charges against him and their maximum penalties, and gave defendant an opportunity to consult with his appointed counsel before making his decision. When asked by the trial court if defendant understood the disadvantages of self-representation after they were laid out for him, defendant responded, "[y]es, Sir" and "I understand. I understand." Defendant was 33 years of age, and had multiple prior encounters with the criminal justice system. Further, the trial court provided defendant with the court rules and the rules of evidence, and explained evidentiary and procedural matters to him. Based on the foregoing, the record does not support that the trial court clearly erred in concluding that defendant's waiver was knowing, intelligent, and voluntary. The trial court is in the best position to make this determination. *People v Adkins (After Remand),* 452 Mich 702, 723; 551 NW2d 108 (1996). The record also supports that the trial court did not believe defendant's self-representation would disrupt or burden the proceedings. *Id.* at 722.

Next, defendant alleges that the trial court erred in scoring 25 points for offense variable (OV) 13, MCL 777.43, for a pattern of criminal conduct involving three or more felonious crimes against a person in the past five years. Because defendant failed to preserve his challenge to the scoring of OV 13, this Court's review is limited to plain error affecting his substantial rights. *People v Kimble,* 470 Mich 305, 309-312; 684 NW2d 669 (2004); *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The trial court scored 25 points for OV 13, which considers a defendant's "continuing pattern of criminal behavior." MCL 777.43. A score of 25 points is proper if the offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). The instructions state, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The sentencing guidelines are interpreted according to the rules of statutory construction; they must not be construed in an absurd or illogical manner, and the primary goal is to ascertain the intent of the Legislature. *People v Lyons,* 222 Mich App 319, 322; 564 NW2d 114 (1997).

In defendant's case, the criminal transaction resulted in five distinct crimes against persons. In addition to sentencing defendant for attempted resisting, obstructing, and disarming of a police officer of a firearm, the offense for which defendant was scored, defendant was also convicted of the concurrent offenses of attempted resisting, obstructing, and disarming a police officer of a non-firearm, and three counts of assaulting, resisting, or obstructing a police officer. In *People v Harmon,* 248 Mich App 522, 524, 527-528; 640 NW2d 314 (2001), this Court held that the defendant was properly assessed twenty-five points under OV 13 for the defendant's four concurrent convictions resulting from criminal activity occurring on the same day, pointing to the evidentiary specificity given with regard to each criminal charge. As in *Harmon,* defendant in this case received five concurrent convictions resulting from criminal activity occurring on the same day. Defendant's presentence investigation report (PSIR) also reveals that he has a prior conviction for resisting and obstructing a police officer on July 28, 2003. Including the

sentencing offense, defendant committed six felony crimes against a person within a five-year period. No plain error occurred in the scoring of OV 13.[1]

Defendant also argues that the scoring of OV 13 deprived him of the right to have a jury determine all the elements of the crime beyond a reasonable doubt because defendant's sentence was enhanced based on judicial fact-finding in violation of *Apprendi v New Jersey*, 530 US 466, 477; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). This claim is meritless. "As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *People v Drohan*, 475 Mich 140, 164, 159; 715 NW2d 778 (2006).

Defendant next argues that the trial court erred in failing to consider mitigating evidence during sentencing. Defendant does not specify the nature of the alleged mitigating evidence to which he is referring. As the appellant, defendant is required to provide this Court with the factual basis supporting his argument upon which he claims reversal is required. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Defendant did not do so, and therefore has abandoned this claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant also claims that defense counsel rendered ineffective assistance in failing to present mitigating evidence or object to the trial court's alleged failure to consider all the mitigating evidence. This claim is also unavailing because, again, defendant failed to identify the alleged mitigating evidence that he believes defense counsel should have presented to the trial court or should have asked the trial court to consider. He has failed to establish the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant next raises several claims of error regarding his sentencing in general. He did not properly preserve any of these claims, *Kimble*, *supra* at 310-311, and they are reviewed for plain error. *Carines*, *supra* at 763. We conclude that no plain error requiring reversal exists.

We find no error in the trial court's articulation of defendant's sentence. "The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *People v Conley*, 270 Mich App 301; 715 NW2d 377 (2006). Although defendant claims that the trial court was required to make findings on the record regarding the four factors set forth in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), that case was decided before the legislative sentencing guidelines were enacted in 1999, and there is no requirement that the trial court must specifically articulate the four factors on the record. *People v Rice (On Remand)*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999). The trial court relied on the guidelines in sentencing defendant, stating, "I think that a fairly substantial sentence within the guidelines is required here[,]" and thereafter cited defendant's extensive criminal history. Further, the maximum term of ten years was permissible because the maximum sentence may be up to the statutory limit of ten years. *Drohan*, *supra* at

[1] In light of our conclusion, we need not address defendant's argument that defense counsel was ineffective by failing to object to the scoring of OV 13.

164; MCL 750.479b(2); MCL 777.16x; MCL 750.479b(2). Defendant was also properly sentenced as an habitual offender. MCL 769.11(1)(a) provides that if a person has been convicted of two or more felonies, he "shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows"; and, the trial court "may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or a lesser crime." We enforce plain statutory language it if it unambiguous, "without further judicial construction or interpretation." *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003). The word "shall" generally indicates a mandatory provision. *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006). And, "may" indicates that discretion is permitted. *People v Brown*, 249 Mich App 382, 386; 642 NW2d 382 (2002). Increasing the maximum minimum guidelines range under the legislative guidelines by 50 percent therefore properly enhanced defendant's sentence. MCL 777.21.

We also find no merit in defendant's argument that his sentence was disproportionate and constituted cruel and unusual punishment. A sentence within the guidelines is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), and "a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). We note that the trial court expressly articulated that it believed defendant's sentence was proportionate given "the seriousness of [defendant's] conduct and record."

Although defendant maintains that the trial court failed to consider the fact that defendant has strong family support and was remorseful, he cites federal sentencing guidelines and federal cases to support his claim that resentencing is required on that basis. Neither constitutes binding authority on this Court. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Further, the record reflects that the trial court considered the mitigating factor of defendant's "sincere apology" but nonetheless noted defendant's "long record here including three felonies, nine misdemeanors . . . even as recently as 2003 we had a malicious destruction of police property conviction in Kent County." Defendant provides no evidence to support his assertion that the trial court ignored letters of family support. Further, the PSIR indicated that defendant has contact with his family, and the trial court relied on the PSIR in sentencing him. The record also reflects that the trial court considered that defendant was not on probation when he committed the instant offenses, and it also decided not to make the sentences consecutive. There exists no plain error.

Defendant additionally contends, citing federal sentencing guidelines, that his abuse of alcohol and drugs warranted a downward departure. The PSIR discloses that defendant has a substance abuse history with alcohol and THC (including marijuana and hashish) from 1986 to July 2003, but that "[t]here is no current history of drug involvement." The federal guidelines are not binding authority, *People v Weathersby*, 204 Mich App 98, 114; 514 NW2d 493 (1994), on the issue of a downward departure. And, alcohol use is not a substantial and compelling reason for a downward departure. *People v Buehler*, 477 Mich 18, 21, 24; 727 NW2d 127 (2007).

Defendant next claims that the trial court should have conducted an assessment, pursuant to MCR 6.425(A)(5), of defendant's rehabilitative potential if he received extensive treatment for substance abuse and psychiatric treatment, and the PSIR therefore did not provide accurate or complete information upon which to sentence defendant. Defendant's claim lacks merit. The

plain language of MCR 6.425(A)(5) does not require that a substance abuse history and psychological report be included in the PSIR; rather, such information is included "depending on the circumstances." *Lyons, supra* at 322. The record does not support that the circumstances required further evaluation of defendant because it indicated that he was in good mental health and, although he had a prior history of substance abuse, he was not currently suffering from the same problems. Defendant has failed to establish that he was sentenced based on inaccurate information.

Next, defendant argues that he was sentenced based on inaccurate information because the probation officer failed to comply with MCL 771.14 and MCR 6.429(A). MCL 771.14 provides that "the probation officer shall inquire into the antecedents, character, and circumstances of the person, and shall report in writing to the court." As discussed, a PSIR was created in defendant's case, the trial court reviewed it, and relied upon it in sentencing defendant. Defendant did not object to the PSIR or claim it was inaccurate. The PSIR is presumed accurate. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Further, "a defendant may not raise an issue challenging the accuracy of the presentence report unless the issue was raised at or before sentencing." *People v Bailey*, 218 Mich App 645, 647; 554 NW2d 391 (1996). In addition, defendant failed to follow the proper procedures as set forth in MCR 6.429(B) for modifying his sentence. MCR 7.208(B); MCR 7.211(C)(1). Regardless, defendant's claim is meritless because, as previously discussed, his sentence was not based on inaccurate information, it was constitutionally proportional, and it did not constitute cruel and unusual punishment.

Finally, with respect to defendant's claim that failure to consider mitigating evidence constituted an equal protection violation, the record does not reflect that the trial court failed to consider the available mitigating evidence. Further, the cases cited by defendant to support his claims are wholly irrelevant and distinguishable where they all involved Eighth Amendment challenges to state death penalty sentencing schemes that limited the factors (i.e., mitigating evidence) a jury could consider when deciding whether a defendant deserved the death penalty.

In defendant's final claim of error, he alleges that the trial court erred when it ordered defendant to pay the costs of prosecution without first determining defendant's ability to pay. We review this unpreserved issue for plain error. *People v Trapp (On Remand)*, 280 Mich App 598; 760 NW2d 791 (2008).

The trial court entered an order requiring defendant to pay $450 in prosecution costs. MCL 769.34(6) provides that "[a]s part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law." MCL 760.1f(1)(a) provides that the trial court may order a defendant to pay "expenses for prosecuting the person" for a "violation or attempted violation of section 625(1) . . . of the Michigan vehicle code[.]" Thus, the trial court had authority to order defendant to pay the costs of prosecution for violation of MCL 257.625(1). The statute's plain language does not require a determination of defendant's present or future ability to pay the cost. In addition, the record does not support that defendant was required to reimburse the costs of prosecution with respect to his other convictions besides driving under the influence of alcohol because the prosecutor specifically requested reimbursement for prosecution costs pursuant to MCL 769.1f, and the trial court's order reflects that "[a]ll monies paid in reimbursement of costs will be placed in the Muskegon County Prosecutor's Office Reimbursement-DUIL Prosecution,

Line Item 0101-0229-680.182." Defendant has failed to demonstrate plain error requiring reversal.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra